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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes had lost their inherent sovereign power to prosecute members of other Tribes for offenses committed on their reservations. Congress responded to the Court's decision by amending the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, to "recognize[] and affirm[]" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians." The question presented is:

Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-22a) is reported at 324 F.3d 635. The vacated panel opinion (App., *infra*, 23a-34a) is reported at 294 F.3d 1004. The opinion of the district court (App., *infra*, 35a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2003. On June 13, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sections 1301 through 1303 of Title 25 of the United States Code are reproduced at App., *infra*, 44a-46a.

STATEMENT

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress amended the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, to recognize and affirm "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). This case concerns whether, in light of the amendment, a Tribe acts as a sovereign when it prosecutes members of other Tribes, as the Ninth Circuit held in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), or whether a Tribe acts as an instrumentality of the United States,

as the Eighth Circuit held here. The resolution of that question bears on whether a subsequent prosecution by the United States for an offense with the same elements is permissible under the Double Jeopardy Clause of the Fifth Amendment.

1. This Court has held that Indian Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law. *United States* v. *Wheeler*, 435 U.S. 313, 323-324 (1978). It follows that, under the "dual sovereignty" principle, the Double Jeopardy Clause permits the prosecution of a tribal member by the United States and by his Tribe for an offense with the same elements. *Ibid.*; *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (describing the dual sovereignty doctrine). The Court has also held, however, that the Tribes were divested of their inherent power to prosecute non-Indians upon their submission to the authority of the United States. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978). In *Duro*, the Court further held that the Tribes were divested of their inherent power to prosecute Indians who are members of other Tribes, sometimes referred to as "nonmember Indians." 495 U.S. at 696; see *id.* at 687-688.

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. It appeared possible that neither the United States, nor the State, nor the Tribe could exercise jurisdiction if the putative defendant was a member of another Tribe, the offense was not among the major crimes enumerated in the Indian Major Crimes Act, 18 U.S.C. 1153 (or a generally applicable federal crime), and Congress had not authorized the State to exercise such jurisdiction. The *Duro* Court acknowledged that problem, 495 U.S. at 697-698, but reasoned that it was for Congress, "which

has the ultimate authority over Indian affairs," to provide a solution, if needed, *id.* at 698.

Congress quickly closed that jurisdictional gap by amending ICRA to recognize the sovereign power of Tribes to exercise criminal jurisdiction over "all Indians." See Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892-1893 (25 U.S.C. 1301(2) and (4)) (the ICRA amendment); see also Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (permanently enacting the ICRA amendment, which was originally effective only through September 30, 1991). In pertinent part, the amendment expanded ICRA's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).

2. Respondent is an enrolled member of the Turtle Mountain Band of Chippewa Indians, which governs a reservation in north-central North Dakota. The events that gave rise to respondent's tribal and federal prosecutions occurred on the Spirit Lake Nation Reservation, which is governed by the Spirit Lake Nation Tribe and which is located in northeastern North Dakota.

On June 13, 2001, police officers of the Bureau of Indian Affairs (BIA) arrested respondent for public intoxication on the Spirit Lake Nation Reservation. When the BIA officers reminded respondent that he was subject to an order excluding him from that reservation, respondent struck one of the officers with his fist. App., *infra*, 2a, 23a.

Respondent pleaded guilty in the Spirit Lake Nation tribal court to three violations of the Spirit Lake Nation tribal code, including violence against a police officer, resisting arrest, and public intoxication. He was sentenced to 90 days' imprisonment for the first of those offenses. See App., *infra*, 36a.

3. On August 29, 2001, respondent was indicted in the United States District Court for the District of North Dakota for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1). The charge involved the same attack on the BIA police officer that was involved in the tribal charge. Respondent consented to proceeding before a magistrate judge. App., *infra*, 35a.

Respondent moved to dismiss the indictment on double jeopardy grounds. The government did not dispute that the tribal assault charge and the federal assault charge involved the same elements, so that successive tribal and federal prosecutions would be permissible under the Double Jeopardy Clause only if they were brought by separate sovereigns. See, *e.g.*, *Wheeler*, 435 U.S. at 316-319 (applying the dual sovereignty doctrine to successive tribal and federal prosecutions of a tribal member).

The magistrate judge rejected respondent's double jeopardy claim that he was being prosecuted twice by the same sovereign. App., *infra*, 37a-40a. The magistrate judge recognized that "the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources." *Id.* at 37a. The magistrate judge found that requirement to be satisfied in this case, reasoning that the United States and the Tribe each exercises its own sovereign authority in prosecuting a member of another Tribe. See *id.* at 40a The magistrate judge explained that the post-*Duro* ICRA amendment is "a valid recog-

nition of inherent rights of Indian tribes," not a delegation of the United States' own prosecutorial power to the Tribes. *Id.* at 40a (quoting *United States* v. *Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), reh'g granted and opinion vacated, 165 F.3d 1209 (8th Cir.) (en banc), cert. denied, 528 U.S. 829 (1999)).

Respondent conditionally pleaded guilty to the violation of 18 U.S.C. 111(a)(1), preserving his double jeopardy claim. He took an interlocutory appeal of the issue before sentencing.[1]

4. A divided panel of the court of appeals affirmed. App., *infra*, 23a-28a.

The panel concluded that the Double Jeopardy Clause did not require the dismissal of the federal prosecution, because the tribal prosecution and the federal prosecution were brought by different sovereigns. App., *infra*, 27a. The panel recognized that this Court's decision in *Duro* held that the Tribes no longer had the inherent sovereign power to prosecute members of

[1] This Court has held that pretrial orders denying motions to dismiss indictments on double jeopardy grounds are "final decisions," within the meaning of 28 U.S.C. 1291, and thus are immediately appealable. *Abney* v. *United States*, 431 U.S. 651, 656-662 (1977). In classifying such orders as within the "small class of cases" that are "beyond the confines of the final-judgment rule," the Court explained that they "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim," are "collateral to, and separable from, the principal issue at the accused's impending criminal trial," and involve rights that cannot be fully vindicated on an appeal following a final judgment. *Id.* at 659-660. Here, in contrast to the ordinary case in which a defendant takes a collateral order appeal from a pretrial order rejecting a double jeopardy claim, petitioner took an appeal only after jeopardy had attached in the second prosecution. That choice would not appear to affect the finality of the order for purposes of Section 1291.

other Tribes. *Id.* at 25a. The panel reasoned, however, that *Duro* was grounded on federal common law, not on any constitutional limitation on tribal sovereignty. *Id.* at 26a-27a. Accordingly, the panel concluded that Congress could modify the federal common law as reflected in *Duro*, and that Congress did so by enacting the ICRA amendment "recogniz[ing] inherent tribal power." *Id.* at 27a.

Chief Judge Hansen dissented. App., *infra*, 28a-34a. He reasoned that the authority for the tribal prosecution and the federal prosecution derived from a single source—"the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States." *Id.* at 33a-34a. He concluded that "[t]he dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable." *Id.* at 34a.

5. After granting rehearing en banc, the court of appeals reversed and remanded with directions to dismiss the indictment. App., *infra*, 1a-22a.

a. The court of appeals recognized that respondent's Double Jeopardy Claim turned on whether or not the United States and the Tribe "exercised authority derived from the same ultimate source of power" in prosecuting respondent. App., *infra*, 4a. The court concluded that a Tribe does not exercise its own sovereign power when it prosecutes a member of another Tribe, relying on *Duro*'s holding that, "[i]n the area of criminal enforcement," a Tribe's retained sovereign power "does not extend beyond internal relations among members." *Id.* at 6a (quoting *Duro*, 495 U.S. at 688).

The court of appeals rejected the panel's characterization of *Duro* as "a common law decision that Congress had the power to override via the ICRA amendments."

App., *infra*, 8a. The court instead "conclude[d] that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *Ibid.* "Once the federal sovereign divests a tribe of a particular power," the court reasoned, "it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Ibid.*

The court of appeals concluded, however, that it "need not construe the ICRA amendment[] as a legal nullity." App., *infra*, 10a. Giving effect to Congress's perceived intent "to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians," the court interpreted the amendment as delegating federal power to Tribes. *Ibid.* Accordingly, the court held that, because respondent was "necessarily prosecuted pursuant to that delegated [federal] power," the "dual sovereignty doctrine does not apply." *Id.* at 11a.

b. Judge Morris Sheppard Arnold, joined by three other members of the court, dissented. App., *infra*, 11a-22a.

Judge Arnold understood this Court's decision in *Duro* to be based not on the Constitution, but on federal common law. App., *infra*, 11a. He reasoned that the ICRA amendment is a permissible exercise of Congress's "plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty." *Ibid.* Accordingly, he concluded that, "[b]ecause the Sprit Lake Nation, in trying [respondent], was simply exercising its own sovereignty, and not a power that Congress delegated to it, [respondent's] double jeopardy rights were not violated." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that Congress cannot authorize Indian Tribes to exercise a sovereign power —the power to prosecute members of other Tribes— that this Court held in *Duro* v. *Reina*, 495 U.S. 676 (1990), that the Tribes had lost. Accordingly, the court interpreted the ICRA amendment, which affirmed "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians," 25 U.S.C. 1301(2), as a delegation of federal power. As a result, the court determined that, after a Tribe exercises the authority recognized in the ICRA amendment to prosecute a non-member Indian, a federal prosecution of that Indian is barred by the Double Jeopardy Clause of the Fifth Amendment. *Duro*, however, was a federal common law decision, not a constitutional one. Nothing in the Constitution, therefore, prevents Congress from prospectively redefining the scope of tribal sovereignty, as it did in the ICRA amendment, to include the power to prosecute non-member Indians.

The Eighth Circuit's en banc decision in this case squarely conflicts with the Ninth Circuit's en banc decision in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), which rejected a similar double jeopardy challenge on the ground that the United States and a Tribe each exercises its own sovereign power when prosecuting a member of another Tribe. And the Eighth Circuit's holding that Tribes conduct such prosecutions only as instrumentalities of the United States undermines effective law enforcement in Indian country. Under that holding, a tribal prosecution, in which only misdemeanor-type punishments may be imposed, would foreclose a subsequent federal prosecution for the same offense or a

greater encompassing offense. Because the question presented in this case is recurring and important,, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Congress Cannot Remove Impediments To The Exercise Of Tribal Sovereign Powers

The court of appeals held that this Court's opinions analyzing the scope of the Tribes' retained sovereign powers are constitutional decisions. The court of appeals consequently held that Congress cannot restore, or remove impediments to the exercise of, sovereign powers that this Court has held to have been divested from the Tribes. Contrary to the court of appeals' view, the scope of tribal sovereignty is defined by federal common law as informed by the backdrop of federal treaties and statutes, not by the Constitution, and thus may be modified by Congress in the exercise of its plenary authority over Indian affairs.

1. The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine permits successive prosecutions by separate sovereigns for offenses with the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence" for purposes of the Double Jeopardy Clause. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

In *United States* v. *Wheeler*, 435 U.S. 313 (1978), this Court considered whether the United States could prosecute a member of the Navajo Nation for statutory rape, one of the major crimes enumerated in 18 U.S.C.

1153, after he had been prosecuted by the Navajo Nation for the lesser included offense of contributing to the delinquency of a minor. The Court reasoned that the issue turned on the ultimate "source of [a Tribe's] power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" 435 U.S. at 322. The Court concluded that, when a Tribe prosecutes a tribal member for a violation of tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," *id.* at 329, and thus that the federal prosecution is permissible under the Double Jeopardy Clause.

In considering the scope of the Tribes' inherent sovereignty, the *Wheeler* Court explained that the Tribes, before their incorporation into the United States, possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323. In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress" and "subject to complete defeasance." *Id.* at 323. The Court added, however, that the Tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* The Court concluded that the Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to their entering into a dependent relationship with the United States. *Id.* at 323-328.

The Court distinguished the Tribes' criminal jurisdiction over their own members from their criminal

jurisdiction over non-Indians, which was at issue in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). There, the Court declined to recognize an inherent tribal power to prosecute non-Indians, reasoning that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court concluded that the Tribes could not exercise such power absent a "treaty provision or Act of Congress." *Id.* at 196 n.6.

In *Duro*, the Court considered the unresolved issue at the "intersection" of *Wheeler* and *Oliphant*—namely, whether the Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. *Duro* held that judicial recognition of such an inherent power would be inconsistent with the Tribes' dependent status, and thus that the Tribes could not exercise that attribute of sovereignty, at least absent some affirmative act by Congress. *Id.* at 684-696.

2. As noted above, Congress enacted the ICRA amendment to restore the criminal jurisdiction that *Duro* found that the Tribes had lost. The text of the amendment embodies Congress's determination to authorize Tribes to act in their own sovereign capacities, not as instrumentalities of the United States, in prosecuting members of other Tribes. The amendment modifies ICRA's definition of tribal "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). Jurisdiction exercised as a "power[] of self-government" necessarily refers to jurisdiction derived

from the Tribes' sovereign authority. And the amendment "recognized" and "affirmed" the existence of that jurisdiction as an "inherent" tribal power, not a federal power.

The legislative history of the ICRA amendment confirms that conclusion. The Senate Report explains that the amendment was intended "to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991). The House Report adds that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991); see H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (the "legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations").

3. The court of appeals held that *Duro* is a constitutional decision and, therefore, cannot be altered by Congress. App., *infra*, 8a. The court was mistaken. *Duro* is properly understood as stating a rule of federal common law, which is "subject to the paramount authority of Congress." *Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981).

The Constitution does not address the extent to which the Tribes retain their sovereign powers after their incorporation into the United States. From the early years of this Nation, tribal sovereignty has been understood to be subject to adjustment by federal treaties and statutes; to the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also *Oliphant*, 435 U.S. at

206 (observing that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," which "beyond their actual text form the backdrop for the intricate web of judicially made Indian law"). Thus, in *Duro*, the Court assessed the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice. See 495 U.S. at 688-692.

The Court has recognized that Congress may, in the exercise of its "plenary" authority over Indian affairs, *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), remove restraints that federal common law would otherwise impose on the Tribes' exercise of their sovereign powers. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 359 (2001) ("Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'") (quoting *Montana* v. *United States*, 450 U.S. 544, 564 (1981)) (emphasis omitted); *Montana*, 450 U.S. at 562 ("If Congress had wished to extend tribal jurisdiction [over hunting and fishing within the reservation] to lands owned by non-Indians, it could easily have done so by [a statutory revision]."); *United States* v. *Mazurie*, 419 U.S. 544, 556-559 (1975) (Congress may authorize a Tribe to regulate the sale of alcoholic beverages by non-Indians on lands owned by non-Indians within its reservation); cf. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the

powers of local self-government which the tribes otherwise possess.").[2]

So, too, Congress may permissibly remove the constraint that *Duro* recognized to exist, as a matter of federal common law, on Tribes' exercise of their sovereign power to prosecute members of other Tribes. Indeed, *Duro* and *Oliphant* suggest that the scope of tribal criminal jurisdiction as articulated in those cases could be modified by future congressional action. See *Duro*, 495 U.S. at 698 ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."); *Oliphant*, 435 U.S. at 212 (identifying "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians"); cf. *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993) (Congress has "ple-

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[2] This Court's use of the term "delegation" in cases such as *Nevada* v. *Hicks*, 553 U.S. at 359, does not imply that a power exercised by the Tribes as a result of congressional action is a federal power, not a tribal power. Rather, the Court has used the term to encompass action by Congress that restores to a Tribe a sovereign power that was previously divested. See *Montana*, 450 U.S. at 564 (preempted "tribal power * * * cannot survive without express congressional delegation"); accord *South Dakota* v. *Bourland*, 508 U.S. 679, 695 n.15 (1993); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (Stevens, J. dissenting). In *Mazurie*, the Court sustained an Act of Congress, 18 U.S.C. 1161, that allows the Tribes to regulate non-Indians' liquor sales on reservations. See 419 U.S. at 556-558. In doing so, the Court recognized that the Tribes exercise "independent tribal authority" when they engage in the liquor regulation allowed by Section 1161, whether or not "this independent authority is itself sufficient for the tribes to" engage in such regulation in the absence of congressional action. 419 U.S. at 557.

nary authority to alter" the allocation of criminal jurisdiction in Indian country).

Even if the constraints on the Tribes' exercise of sovereign powers were viewed as deriving from understandings or default rules reflected in the Constitution, it would not necessarily follow, as the court of appeals assumed, that Congress could not authorize an exercise of power that the Tribes would otherwise lack. The Commerce Clause operates as a constraint on the States' inherent sovereign power to regulate commerce within their borders. Yet, Congress may authorize States to exercise that power in a manner that the Commerce Clause would otherwise forbid. See, *e.g.*, *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 2142, 2147 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce."); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 421-436 (1946) (concluding that the States regained the authority, as a result of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to regulate insurance in a manner that could otherwise violate the Commerce Clause).

B. The Court Of Appeals Erred In Rewriting The ICRA Amendment As A Delegation Of Federal Prosecutorial Power

1. Having determined that Congress could not restore the Tribes' sovereign power to prosecute members of other Tribes, the court of appeals construed the ICRA amendment as delegating federal prosecutorial power to the Tribes. App., *infra*, 10a-11a. That ruling cannot be squared with the amendment's text and legislative history.

As discussed above, the ICRA amendment "recognize[s] and affirm[s]" that the Tribes' "powers of self-

government" include "the inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). That language can be understood only as an attempt to restore that aspect of tribal sovereignty. The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, *supra*, at 7. Nor is there any reason to assume that Congress would have countenanced the adverse consequences for Indian country law enforcement that would result from the court of appeals' recharacterization of the amendment. See pp. 22-23, *infra*.

The court of appeals had no authority, in the name of saving the ICRA amendment, to rewrite it in a manner that Congress did not intend. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *, or judicially rewriting it.") (citation and internal quotation marks omitted). If, contrary to the government's view, Congress could not restore the tribal sovereign power to prosecute members of other Tribes, the ICRA amendment would have to be invalidated, not recharacterized as a delegation of federal prosecutorial power.

2. If the ICRA amendment were invalid as exceeding Congress's constitutional authority, the Spirit Lake Nation would have lacked criminal jurisdiction over respondent. Jeopardy therefore would not have attached in his tribal prosecution for purposes of the Double Jeopardy Clause. See *United States* v. *Phelps*, 168 F.3d 1048, 1054-1055 (8th Cir. 1999) (rejecting a double jeopardy challenge to a federal prosecution, which followed

a tribal prosecution for an offense with the same elements, because the Tribe lacked criminal jurisdiction over a non-Indian defendant); *California* v. *Mesa*, 813 F.2d 960, 963 n.5 (9th Cir. 1987), aff'd, 489 U.S. 121 (1989). And, if jeopardy did not attach in the tribal prosecution, a federal prosecution would not put respondent twice in jeopardy, and there would be no double jeopardy bar to this federal prosecution.

C. Two Circuits With Extensive Indian Country Are In Square Conflict On The Validity Of The ICRA Amendment As A Restoration Of Tribal Sovereign Authority

The Eighth Circuit's decision in this case squarely conflicts with the Ninth Circuit's decision in *United States* v. *Enas*. See App., *infra*, 8a (court notes its disagreement with *Enas*); *id.* at 22a (Arnold, J., dissenting) (observing that the court's decision is "contrary" to *Enas*); see also *Enas*, 255 F.3d at 673 (noting disagreement with an Eighth Circuit panel decision similar to the decision in this case, see *United States* v. *Weaselhead*, 156 F.3d 818, 823 (1998), reh'g granted and opinion vacated, 165 F.3d 1209 (en banc), cert. denied, 528 U.S. 829 (1999)).

In *Enas*, the defendant, a member of the San Carlos Apache Tribe, had been convicted in the tribal court of the White Mountain Apache Tribe on charges of assault with a deadly weapon and assault with intent to cause serious bodily injury. He was subsequently indicted in federal district court on the same charges under 18 U.S.C. 113(a) and 1153. The district court dismissed the indictment on double jeopardy grounds. The court of appeals, sitting en banc, reversed and remanded for trial. See *Enas*, 255 F.3d at 675.

The Ninth Circuit unanimously held that the dual sovereignty doctrine permits an Indian to be prosecuted successively for an offense with the same elements by the United States and by a Tribe other than his own. Although the majority and the concurrence reached that conclusion by different routes, all members of the en banc court agreed that Congress could respond to *Duro* by defining Tribes' inherent sovereign powers to include the exercise of criminal jurisdiction over reservation crimes committed by non-member Indians. See 255 F.3d at 670 (observing that the majority and the concurring judges "agree that Congress has the authority to identify the parameters of tribal sovereignty").

The majority characterized the ICRA amendment as an attempt by Congress "to replace *Duro*'s historical narrative—according to which the tribes had no power over nonmember Indians—with a different version of history that recognized such power to be 'inherent.'" *Enas*, 255 F.3d at 669. The majority acknowledged that Congress could not do so if *Duro*'s historical understanding of tribal sovereignty rested on the Constitution. *Id.* at 673. The majority reasoned, however, that "*Duro* is not a constitutional decision but rather * * * a decision founded on federal common law," noting that "[n]owhere does *Duro* intimate that it is announcing a constitutional precept, nor does it state that its analysis is compelled or influenced by constitutional principles." *Ibid.* "Consequently," the majority concluded, "Congress had the power to do exactly what it intended when it enacted the 1990 amendments to the ICRA," *i.e.*, "to determine that tribal jurisdiction over nonmember Indians was inherent." *Id.* at 675.

The four concurring judges viewed *Duro* as conclusively determining, as of the time of that decision, the

federal common-law relationship between the United States and the Tribes and the extent to which the Tribes retained an aspect of their sovereignty. See *Enas*, 255 F.3d at 678-679 (Pregerson, J., concurring). The concurrence nonetheless reasoned that Congress could prospectively redefine that relationship, and thus could "add[] to * * * tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes." *Id.* at 680.

The decision in this case cannot be reconciled with *Enas*. In the Ninth Circuit, successive tribal and federal prosecutions of a non-member Indian for an offense with the same elements is permissible; in the Eighth Circuit, they are not. Because the vast majority of the Nation's Indian country lies within the Eighth and Ninth Circuits, together with the Tenth Circuit, there is particular reason for the Court to resolve the conflict in this case without awaiting additional cases from other circuits.

D. The Question Presented In This Case Has Significant Ramifications For Law Enforcement In Indian Country

The question whether the ICRA amendment permissibly restored the Tribes' sovereign authority to prosecute members of other Tribes is of great practical importance. If the ICRA amendment is invalid, or if it is construed as a delegation of federal prosecutorial authority, law enforcement in Indian country will be significantly undermined.

1. As the House and Senate Committee Reports on the ICRA amendment recognized, "the administration of justice in Indian country is better served by allowing tribes to exercise jurisdiction over all criminal misdemeanor cases involving Indians." H. R. Rep. No. 61, *supra*, at 7; accord S. Rep. No. 168, *supra*, at 6. That is so for several reasons.

First, as a matter of existing law, neither the United States nor, in many instances, the State has authority to prosecute minor crimes committed by one Indian against another Indian in Indian country. Absent a change in the law, therefore, many offenses committed by non-member Indians could fall within a "jurisdictional void," unable to be prosecuted by any government. S. Rep. No. 168, *supra*, at 4.

Second, neither the United States nor the State might be able to devote sufficient resources to the prosecution of minor crimes committed by non-member Indians. The Senate Committee Report found that, after *Duro*, "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of nonmember Indians." S. Rep. No. 168, *supra*, at 4. The Committee also found that, even in Public Law 280 States (where States have been granted the authority to prosecute crimes committed by Indians in Indian country, see 18 U.S.C. 1162, 28 U.S.C. 1360), "state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands." S. Rep. No. 168, *supra*, at 4.

Third, and relatedly, "[m]ost Indian reservations are located far from urban centers, they are geographically isolated and remote, they are separated from state law enforcement centers by significant distances." S. Rep. No. 168, *supra*, at 7. As the House Committee Report observed, prosecuting minor crimes committed by non-member Indians in distant federal or state courts not only would be "impractical and inefficient," but also would reduce the "deterrent effect" and "community

awareness" produced by administering justice "within the community where the offenses were committed." H.R. Rep. No. 61, *supra*, at 3.

2. Other law enforcement concerns would be presented if the ICRA amendment were construed, as the court of appeals construed it, to authorize Tribes to exercise federal prosecutorial authority over members of other Tribes. In that event, whenever a federal offense was committed on a reservation by a non-member Indian, a tribal prosecution for the "same offence," which includes any lesser-included offense, would bar a federal prosecution. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996) (Double Jeopardy Clause bars successive prosecutions for lesser-included and greater-encompassing offenses, because they are the "same offence" within the meaning of the Clause). Although there is no limit to the types of offenses that Tribes may prosecute, punishments are limited to one year's imprisonment and a $5000 fine for any offense. 25 U.S.C. 1302(7). Often, therefore, a tribal prosecution, even if successful, could not result in a sentence adequate to vindicate federal interests. Here, for example, the offense of assault on a federal officer, while carrying misdemeanor penalties when it involves "only simple assault," carries a sentence of as much as 20 years' imprisonment if the defendant used a deadly or dangerous weapon or inflicted bodily injury. See 18 U.S.C. 111(a) and (b).

In many instances, a Tribe could be expected to defer prosecuting a non-member Indian until the United States had decided whether to do so. The risk would nonetheless exist that, whether as a result of choice or inadvertence, a tribal prosecution could occur before a decision whether to pursue a federal prosecution had been made. A Tribe may have different law enforcement priorities and objectives than does the United States; for example, a Tribe may perceive that a violation of tribal law is more effectively addressed within the reservation community by measures other than incarceration. If the Eighth Circuit's decision were to stand, a non-member Indian would have a great incentive to seek tribal prosecution, thereby gaining protection from federal prosecution. See *Wheeler*, 435 U.S. at 330-331 (noting incentives that would exist for tribal members to plead guilty to tribal offenses in order to avoid prosecution for federal offenses carrying more severe penalties).

In sum, whether the ICRA amendment validly restored the Tribes' sovereign power to prosecute non-member Indians—and, if not, whether the amendment should be construed as a delegation of federal power—are questions of vital importance for Indian country law enforcement. For that reason, as well, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3695

UNITED STATES OF AMERICA, APPELLEE

v.

BILLY JO LARA, ALSO KNOWN AS BILLY JOE LARA, APPELLANT

Submitted: Sept. 11, 2002
Filed: Mar. 24, 2003

Before HANSEN, Chief Judge, MCMILLIAN, BOWMAN, WOLLMAN, LOKEN, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, and SMITH, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

After a Spirit Lake Nation Reservation tribal court convicted him of assaulting a police officer, Billy Jo Lara was indicted by the federal government for assault on a federal officer in violation of 18 U.S.C. § 111(a)(1). Lara moved to dismiss the indictment on double jeopardy and selective prosecution grounds. Following the district court's denial of the motion, Lara entered a conditional plea of guilty to the indictment, reserving his right to appeal the denial of his motion to dismiss. A panel of this court affirmed, holding that because the power of the Spirit Lake Nation derives

from its retained sovereignty and not from Congressionally delegated authority, Lara's conviction on the federal charge did not run afoul of the Double Jeopardy Clause. We granted Lara's petition for rehearing en banc, vacating the panel's opinion and judgment. We now reverse.

I.

While on the Spirit Lake Nation Reservation on June 13, 2001, Lara was arrested for public intoxication by Bureau of Indian Affairs police officers. The officers informed Lara, who is not a member of the Spirit Lake Nation, of an exclusion order prohibiting him from entering the reservation. Upon hearing of the exclusion order, Lara struck one of the officers with his fist. Lara was charged with five violations of Spirit Lake Tribal Code: violence to a policeman, resisting lawful arrest, public intoxication, disobedience to a lawful order of the tribal court, and trespassing. On June 15, Lara pled guilty to the first three charged offenses and was sentenced to a jail term of 155 days. On August 29, a federal grand jury returned an indictment charging Lara with assault on a federal officer in violation of 18 U.S.C. § 111(a)(1). After consenting to proceed before a United States Magistrate Judge, Lara moved to dismiss the indictment on double jeopardy and selective prosecution grounds or, in the alternative, that discovery be allowed on the claim of selective prosecution. As recounted above, the magistrate judge denied the motions, and Lara entered a plea of guilty conditioned on his right to seek appellate review of his motion to dismiss the indictment.

II.

We review *de novo* the denial of a motion to dismiss on double jeopardy grounds. *United States v. Alverez*, 235 F.3d 1086, 1089-90 (8th Cir. 2000). The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The right to be free from multiple prosecutions is limited by the dual sovereignty doctrine, which permits an independent sovereign to prosecute an individual who has been prosecuted by another sovereign for the same act. One who violates the laws of two independent sovereigns commits an offense against each, and thus a second prosecution is not for "the same offence." *Heath v. Alabama*, 474 U.S. 82, 88, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985).

The application of the dual sovereignty doctrine "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Id.* The Double Jeopardy Clause does not permit successive prosecutions under the dual sovereignty doctrine where the authority for the prosecution derives from the same sovereign source. *See, e.g., Waller v. Florida*, 397 U.S. 387, 393-95, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970) (a city and its parent state); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-66, 58 S. Ct. 167, 82 L. Ed. 235 (1937) (the federal government and a territorial government); *United States v. Mills*, 964 F.2d 1186, 1193 (D.C. Cir. 1992) (en banc) (the federal government and the District of Columbia). Conversely, the dual sovereignty doctrine permits a state to prosecute a defendant who has previously been prosecuted for the same act by another state or the federal government. *Heath*, 474 U.S. at 93, 106 S. Ct. 433 (two states);

Bartkus v. Illinois, 359 U.S. 121, 139, 79 S. Ct. 676, 3 L.Ed.2d 684 (1959) (upholding state prosecution following federal prosecution); *United States v. Williams*, 104 F.3d 213, 216 (8th Cir. 1997) (upholding federal prosecution following state prosecution). Consequently, whether the dual sovereignty doctrine applies to Lara's double jeopardy challenge turns on whether the Spirit Lake Nation exercised sovereign authority emanating from a sovereign source distinct from that of the overriding federal sovereign.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978), the Supreme Court held that a tribe had no inherent power to prosecute non-Indian residents of its reservation. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210, 98 S. Ct. 1011. In *United States v. Wheeler*, the defendant raised a double jeopardy challenge to a federal prosecution commenced after Wheeler, an enrolled member of the tribe, had been convicted in tribal court on a lesser included offense. 435 U.S. 313, 315-16, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). Wheeler argued that because Congress has plenary authority to abrogate tribal sovereignty, the tribe was in effect an arm of the federal government. *Id.* at 319, 98 S. Ct. 1079. The Court explained that its dual sovereignty precedents did not turn on the extent of control one sovereign had over another, but whether the two prosecutions exercised authority derived from the same ultimate source of power. *Id.* at 319-20, 98 S. Ct. 1079. The Court held that among the "unique and limited" sovereign powers retained by the tribe was the power to punish "members of the Tribe for violations of tribal law." *Id.* at 323-24, 98 S. Ct. 1079. The distinction expressly and repeatedly drawn by the Court was not premised on the racial status of the defendant but on his membership status. Although tribes retained authority over their internal affairs, they had been implicitly or explicitly divested of authority over nonmembers. *Id.* at 324-25, 98 S. Ct. 1079. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326, 98 S. Ct. 1079. Because Wheeler was an enrolled member of the tribe, he was prosecuted pursuant to an inherent sovereign power that had never been divested from the tribe, and thus subsequent federal prosecution for the same act was not barred. *Id.* at 332, 98 S. Ct. 1079.

In *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), the Court again emphasized the distinction between the retained or inherent sovereignty over internal relations between members of the tribe and the sovereignty over external relations that necessarily had been divested from the tribes. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*." *Id.* at 564, 101 S. Ct. 1245 (quoting *Wheeler*, 435 U.S. at 326, 98 S. Ct. 1079, emphasis added by *Montana* Court). The Court held that the tribe's retained inherent sovereignty did not authorize it to regulate hunting and fishing by nonmembers on reservation land owned in fee by nonmembers. *Id.* at 564-65, 101 S. Ct. 1245.

The question of what power a tribe has over nonmember Indians was addressed in *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). Duro, an enrolled member of a different tribe, was charged in Pima-Maricopa Indian Community Court with unlawful firing of a weapon, a misdemeanor, in connection with the death of an Indian boy. *Id.* at 679-81, 110 S. Ct. 2053. His motion to dismiss for lack of jurisdiction was denied. *Id.* at 681-82, 110 S. Ct. 2053. Because the Salt River Pima-Maricopa Indian Community did not claim that its jurisdiction over Dura stemmed from Congressionally delegated authority, the Court was faced with the question whether the tribe's retained or inherent sovereignty provided it with jurisdiction over a nonmember Indian. The Court held that it did not. *Id.* at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members.").

In response to the decision in *Duro*, Congress amended the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, by revising the definition of "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The amendment also defined "Indian" to include all Indians subject to federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. § 1153. 25 U.S.C. § 1301(4). Thus, under the ICRA amendments, Indians who are enrolled members of a federally recognized tribe are subject to the jurisdiction of all tribes.

Although the Supreme Court has not yet construed the post-*Duro* ICRA amendments, it has repeatedly reaffirmed its holdings limiting tribal sovereign author-

ity to tribe members. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) (rejecting under the *Montana* test the imposition of a hotel occupancy tax on nonmember-owned reservation hotel on non-Indian fee land); *Nevada v. Hicks*, 533 U.S. 353, 358-59, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (citing *Oliphant* for the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L. Ed. 2d 303 (1978), the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564, 101 S. Ct. 1245.

South Dakota v. Bourland, 508 U.S. 679, 694-95, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993).

In *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998), we construed the ICRA amendments in a double jeopardy case factually similar to the present case. The district court had held that *Duro* and *Oliphant* were federal common law decisions within the ultimate authority of Congress to overrule. 36 F. Supp. 2d 908, 914-15 (D. Neb. 1997). A divided panel of this court reversed, concluding that "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the

scope of Congress's authority to alter retroactively by legislative fiat." 156 F.3d at 824. On rehearing en banc, the panel opinion was vacated and the district court affirmed by an evenly divided court. 165 F.3d 1209 (8th Cir. 1999).

The Ninth Circuit has held *Duro* to be a common law decision that Congress had the power to override via the ICRA amendments. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied* 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002). Although the *Enas* court conceded that sovereignty has "constitutional implications," *id.* at 673, it concluded that the lack of an express citation to a constitutional provision indicated that *Duro* was a common law decision, an area in which Congress is supreme. *Id.* at 674-75.

With all due respect to the holding in *Enas*, we conclude that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from Congress, a tribe's powers are those "inherent powers of a limited sovereignty which has never been extinguished." *Wheeler*, 435 U.S. at 322, 98 S. Ct. 1079 (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945)) (emphasis omitted). Once the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power.

Congress's broad authority over Indian affairs derives from and is limited by the Constitution. Some decisions root this power in the Indian Commerce Clause. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 n.6, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998); *McClanahan v. Arizona*, 411 U.S. 164,

172 n.7, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). Prior to 1903, the federal government negotiated agreements with Indian tribes pursuant to its treaty power, U.S. Const. art. II, § 2, cl. 2, but the combination of an 1871 statute and the development of the plenary power doctrine ended this process. *Antoine v. Washington*, 420 U.S. 194, 201-04, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975). The Supreme Court has suggested that we must be guided in part by structural principles that are both implicit and explicit in the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); *see also Duro*, 495 U.S. at 684, 110 S. Ct. 2053 ("The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over non-members."). Some decisions have found plenary authority in the government's trust responsibility, *Stephens v. Cherokee Nation*, 174 U.S. 445, 478, 19 S. Ct. 722, 43 L. Ed. 1041 (1899), or in the guardian-ward relationship between the federal government and the tribes, *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), but references to these non-constitutional sources of power have largely been supplanted by a reliance on the commerce power. *See, e.g., Alaska v. Native Village*, 522 U.S. at 531 n.6, 118 S. Ct. 948.

The ICRA amendments are "a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government." *Weaselhead*, 156 F.3d at 823. In exercising its commerce power, Congress may not "override a constitu-

tional decision by simply rewriting the history upon which it is based." *Enas*, 255 F.3d at 675. *Duro*'s determination of first principles regarding Indian sovereignty within the federal system of government is ultimately one for the Court. The Court reaffirmed this principle subsequent to the ICRA amendments:

> The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe[.]" 450 U.S. at 565, 101 S. Ct. 1245. While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers "cannot survive without express congressional delegation," 450 U.S. at 564, 101 S. Ct. 1245, and is therefore *not* inherent.

Bourland, 508 U.S. at 695 n.15, 113 S. Ct. 2309 (internal citations omitted). Thus the ICRA amendments cannot have the effect that they plainly sought to achieve: a retroactive legislative reversal of *Duro*. We need not construe the ICRA amendments as a legal nullity, however. It is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians. *See Hicks*, 533 U.S. at 377 n. 2, 121 S.Ct. 2304 ("In response to our decision in *Duro*, . . . Congress passed a statute expressly granting tribal courts [jurisdiction over nonmember Indians].") (Souter, J., concurring). Nothing in our decision today in any way circumscribes the jurisdiction so conferred.

The Spirit Lake Nation exercises authority over external relations only to the extent that such a power has been delegated to it by Congress. As a nonmember, Lara was necessarily prosecuted pursuant to that delegated power. Because the dual sovereignty doctrine does not apply where the ultimate source of power is the same, the Double Jeopardy Clause bars the government from maintaining a second prosecution for the same act. Accordingly, the motion to dismiss the indictment should have been granted.

The order denying the motion to dismiss on double jeopardy grounds is reversed, and the case is remanded to the district court with directions to dismiss the indictment.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting, in which BOWMAN, MURPHY, and SMITH, Circuit Judges, join.

The essential difficulty that I see with the result that the court reaches today is that the Supreme Court in *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990), did not base its decision on the Constitution, nor did the Constitution require the result that the Court reached there. The result in that case was instead based on federal common law, nothing more and nothing less, and in the ICRA amendments Congress exercised its plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty. In other words, Congress restored to the tribes a power that they had previously exercised but had lost over the years as a result of Supreme Court decisions. Because the Spirit Lake Nation, in trying Mr. Lara, was simply exercising its own sovereignty, and not a power that

Congress delegated to it, Mr. Lara's double jeopardy rights were not violated.

I.

According to current legal thought, Indian tribes possessed criminal jurisdiction over nonmember Indians as part of their full territorial sovereignty prior to colonization by us or our European predecessors. *See Duro*, 495 U.S. at 685-86, 110 S. Ct. 2053. The Supreme Court held in *Duro*, however, that the Indians had lost this aspect of their sovereignty because of their "dependent" status. *See id.; cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

The court opines in the present case that "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." This holding draws on statements in Supreme Court opinions that a tribe's inherent sovereignty consists of those aspects of sovereignty that the tribes "retained" despite the federal government's overriding sovereignty. *See, e.g., Duro*, 495 U.S. at 685, 110 S. Ct. 2053. The court's apparent premise is that power cannot be a retained one once the Supreme Court holds that it no longer exists.

This premise, however, fails both as a matter of history and of logic. Historically, it misapprehends the materials that the Supreme Court has used over the years to fashion the relationship between the United States and Indian tribes; logically, it improperly assumes that there is only one way that a power can be retained. In my view, the ICRA amendments did not create a new tribal power out of whole cloth, it merely

relaxed a common-law restriction on a power previously possessed. Regardless of the fact that the ICRA amendments are a "but-for" cause of the Spirit Lake Nation's ability to try Mr. Lara here (which of course they necessarily are), the origin of that power was not the ICRA amendments themselves but the full territorial sovereignty that the tribes possessed in the past. *Cf. Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-33, 437-38, 66 S. Ct. 1142, 90 L.Ed. 1342 (1946). Thus, the power at hand is a "retained" one, even if it had been rendered temporarily unavailable by decisions of the United States Supreme Court.

A.

Three cases from the early nineteenth century, all of which Chief Justice Marshall wrote, provided a foundation for federal Indian law: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 8 L.Ed. 25 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 8 L.Ed. 483 (1832). An examination of these cases shows that in forging the legal relationship between Indian tribes and the government of the United States, "the Supreme Court in the Marshall trilogy embraced pre-constitutional notions of the colonial process, rooted in the law of nations, involving both inherent tribal sovereignty and a colonial prerogative vested exclusively in the centralized government." *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 57 (1996). These principles, which the Supreme Court created from extra-constitutional sources, have "been consistently followed by the courts for more than a hundred years." *See* Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1988); *cf.* Frickey, *supra*, at 58-60.

In *M'Intosh*, 21 U.S. at 573, Chief Justice Ma
justified federal power over Indian tribes in ter
the right of discovery, a euphemism for the rig
conquest, *see* Judith Resnik, *Multiple Sovereig
*Indian Tribes, States, and the Federal Governme
Judicature 118, 119 (1995). That this right was u
sally recognized, he asserted, was "prove[d]" b
history of America from its discovery to the p
day." *M'Intosh*, 21 U.S. at 574. As Judge Canb
explained, "[t]he principles of discovery were, of c
European (and, by adoption, federal) law [a
Marshall's view that was the only kind of law th
Supreme Court could apply." William C. Canb
Federal Indian Law 69 (3d ed. 1998).

Eight years later in *Cherokee Nation*, 30 U.S.
17, Chief Justice Marshall held that Indian tribe
foreign states, but ones with a special relation
the United States, namely, that "of a ward
guardian." In making this determination, the
Justice looked not to the Constitution but
M'Intosh, to the uniform custom of nations a
history of our country's dealings with Indian
See id. at 16-18. The next year in *Worcester*, 31
555, Chief Justice Marshall wrote that the relat
of the Cherokees to the United States "was th
nation claiming and receiving the protection
more powerful: not that of individuals abandonin
national character, and submitting as subjects
laws of a master." He then held that under inter
law the Indian tribes retained the right
government, because

> [t]he very fact of repeated treaties wit
> recognizes it; and the settled doctrine of th
> nations is, that a weaker power does not su

> its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its own safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. *Id.* at 560-61.

At the end of the century, the Court reaffirmed these sentiments in *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886). A few years before that case, in *Ex Parte Crow Dog*, 109 U.S. 556, 3 S. Ct. 396, 27 L.Ed. 1030 (1883), the Court had held that the murder of an Indian by another Indian in Indian country was within the sole jurisdiction of the tribe, and so federal territorial courts had no power over such a crime. Congress reacted by passing the Indian Major Crimes Act, 18 U.S.C. § 1153, declaring murder and other serious crimes committed by an Indian in Indian country to be federal offenses triable in federal court. In *Kagama*, the Court upheld the constitutionality of the act, despite the fact that the Constitution "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders," 118 U.S. at 378, 6 S. Ct. 1109, and even though the Court was "not able to see in [any clause] of the constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of [serious crimes]," *id.* at 379, 6 S. Ct. 1109. Rather, the Court concluded, the legitimacy of the act derived from extra-constitutional sources, such as its necessity for the Indians' protection and the fact that the power to pass the act "must exist in th[e federal] government because it never has existed anywhere else; because the theater of its exercise is

within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." *Id.* at 384-85, 6 S. Ct. 1109.

Unlike *Kagama*, which addressed the question of whether a grant of federal criminal jurisdiction in Indian country was consistent with the federal government's role as "guardian," *Oliphant, United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978), and *Duro*, addressed the converse question, that is, whether the retention of certain criminal jurisdiction in Indian country was consistent with the Indian tribe's role as "ward." Despite this difference, all four cases reached their answers in the same way, namely, by reference to governmental custom and practice and to the general principles of the *jus gentium*. What is importantly missing from all of these cases is the slightest intimation that their outcome was dictated by some substantive constitutional principle.

In *Wheeler*, 435 U.S. at 324-26, 98 S. Ct. 1079, for instance, the Court analyzed various statutes establishing federal criminal jurisdiction over crimes involving Indians, and described how these statutes had left in place tribal criminal jurisdiction over members as part of the inherent sovereign power of Indian tribes. In discussing why none of these statutes had divested the Indians of this power, the Court restated the sentiments expressed in *Worcester* that the "'settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.'" *See Wheeler*, 435 U.S. at 326, 98 S. Ct. 1079 (quoting *Worcester*, 31 U.S. at 560-61). *Wheeler* thus quite clearly decided that tribes retained criminal

jurisdiction over tribal matters as a matter of federal common law.

Although neither *Oliphant* nor *Duro* ever explicitly stated that it was a common-law decision, or referred to the law of nations, these decisions too were founded on federal common law. *See, e.g.*, Canby, *supra*, at 127; Philip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L. J. 1, 65 (1999); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 853 (1996). In both cases, the Court analyzed history and governmental custom and devised from them the principle that, as a result of the dependent status of Indian tribes, tribal criminal enforcement power did not extend beyond internal relations among its members. *See Duro*, 495 U.S. at 685-92, 110 S. Ct. 2053; *Oliphant*, 435 U.S. at 196-210, 98 S.Ct. 1011; *cf. United States v. Enas*, 255 F.3d 662, 668-69 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002).

The Court in *Duro* did say that any power delegated to the tribes would be "subject to the constraints of the Constitution," 495 U.S. at 686, 110 S. Ct. 2053, and that there would be due process concerns in subjecting nonmember Indians to trial in tribal courts because those courts did not provide constitutional protections as a matter of right, *see id.* at 693-94, 110 S. Ct. 2053. But none of this can serve to convert *Duro* into a "constitutional" decision. A decision is "constitutional" only when it states, or necessarily implies, that the Constitution requires the result that it reaches.

In *Duro*, as in all cases, the Court had the obligation and the power under Article III to decide the case

before it and "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Without any statute stating whether Indian tribes had criminal jurisdiction over nonmember Indians, it acted as a common-law court, using whatever sources were relevant and readily at hand to ascertain the applicable legal principles and to answer the question before it. As with all federal common law, however, Congress has the legislative authority to revise the result in *Duro* in whatever way it desires.

B.

The court holds that *Duro* 's distinction between inherent and delegated powers is of "constitutional magnitude." I take that to be a claim that *Duro* was based on the Constitution and, therefore, that the Court's determination in *Duro* of what constitutes inherent tribal sovereignty is final and binding on Congress. The court, however, never says precisely where in the Constitution principles of Indian sovereignty might actually reside. *Cf. United States v. Weaselhead*, 156 F.3d 818, 825 (8th Cir. 1998) (M.S.Arnold, J., dissenting).

The court does provide two possibilities. First, it refers to "structural principles that are both implicit and explicit in the Constitution," citing *Duro* and *Seminole Tribe*. The court, however, does not describe what these structural principles are, nor does it explain why they derived from the Constitution. In fact, "no court has [ever] found a constitutionally protectible interest in tribal sovereignty itself," Canby, *supra*, at 85; and, "[t]o the extent that Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its" perimeters, Judith Resnik,

Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 691 (1989).

Perhaps the proposition that the court is urging is that since certain attributes of state sovereignty derive from the structure of the Constitution, *see, e.g., Alden v. Maine*, 527 U.S. 706, 724, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), the perimeters of inherent tribal sovereignty must do so as well. That proposition, however, fails to recognize the fact that "[u]nlike states, which ceded some sovereignty with the passage of the Constitution, Indian tribes did not." Resnik, *Multiple Sovereignties, supra*, at 119. The Indian tribes did not participate in the making of the Constitution, so its structure cannot tell us anything about the extent of their sovereignty. *Cf. Worcester*, 31 U.S. at 555, 559-60; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 949 (1986). Thus, as Chief Justice Marshall noted in *Worcester*, Indian nations, such as the Cherokees in *Worcester*, remained "distinct, independent political communities" even after the adoption of the Constitution. *Worcester*, 31 U.S. at 559-61. The status of Indian tribes in our constitutional order is thus more akin to that of foreign nations than to that of the states.

Second, the court points out that in recent years references to "non-constitutional sources of [Congress's plenary power] have largely been supplanted by a reliance on the [Indian] commerce power." But the fact that the scope of the Indian commerce power has expanded in recent years and is now often seen as the source of legislation that regulates the Indians as dependent communities, *e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998), does not mean that the

traditional view of the origins of the relationship between Indian tribes and the United States has somehow been submerged. When pressed for a source of Congress's plenary authority, the Court tends increasingly to rely on the Indian commerce clause, I think, simply because in the particular context, it sees no need to look further.

The source of Congress's plenary power is in any case beside the point: Regardless of its source, it is well settled that Congress's power is plenary. It is a non sequitur to intimate that because the source of the plenary power *may* have changed from a "non-constitutional" to a constitutional source, Congress's ability to legislate is somehow circumscribed. If that were true, then Congress's authority would no longer be plenary. *Cf. Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S. Ct. 216, 47 L.Ed. 299 (1903).

Even if the mere existence of the Indian commerce clause somehow restricted the powers that tribes inherently possess, moreover, inherent tribal sovereignty would still be a matter of federal common law. Consider, as an analogy, dormant commerce clause restrictions on state legislation that unduly burdens interstate commerce. A court can invalidate a state law on dormant commerce clause grounds, but Congress can reverse the court's decision and authorize the state to re-enact the legislation: Dormant commerce clause prohibitions are thus considered federal common law. *See, e.g.*, Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 Ark. L. Rev. 1175, 1175 (2003); *cf.* Frickey, *A Common Law*, *supra*, at 71-72. Thus, no matter how one views the matter, Congress retains legislative authority to determine prospectively what power tribes inherently possess.

C.

The court also relies on *South Dakota v. Bourland*, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993), a case that it notes was decided "subsequent to the ICRA amendments." The Supreme Court in that case did state that the exercise of tribal power beyond what is necessary to control internal relations is not inherent and therefore cannot survive without express congressional delegation, *see id.* at 694-95 & n.15, 113 S. Ct. 2309, and our subsequent case law is replete with similar statements. But, as always, language must be understood in context, and the context in which these statements were made was different in a way that makes the present case legally distinguishable.

Although *Bourland* and some other cases that were decided after the ICRA amendments, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), have addressed inherent and delegated powers, they did not involve the amendments. The question raised here, namely, whether Congress could restore aspects of sovereignty to tribes, rather than delegate power to it, therefore did not arise in those cases and could not have been decided by them. It is only if Congress does not have the power to restore aspects of Indian sovereignty that delegation becomes the only option. In my opinion, the statements in cases such as *Oliphant* and *Duro* that the jurisdiction in question was not inherent and could only be delegated by Congress described what would be true absent the sort of legislation that we have before us. *Cf. Hicks*, 533 U.S. at 377 n.2, 121 S. Ct. 2304 (Souter, J., concurring).

II.

In reaching its conclusion, the court rejects a contrary result by a unanimous eleven-judge court in *Enas*, 255 F.3d 662. Though the rationales in the two opinions in that case differed somewhat, all of the judges agreed that the inherent sovereignty of Indian tribes was a matter of federal common law, not constitutional law. For the reasons that I have tried to explain, that conclusion seems to me to be ineluctable.

The basic question in this case is whether providing tribes with the inherent power to try nonmember Indians for crimes falls within Congress's plenary authority over Indian affairs (which the court agrees that Congress has). In light of the Supreme Court pronouncement that all "aspect[s] of tribal sovereignty . . . [are] subject to plenary federal control and definition," *see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986), it seems to me that the only possible answer to that question is that Congress can do what it quite plainly sought to do here.

I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3695

UNITED STATES OF AMERICA, APPELLEE

v.

BILLY JO LARA, ALSO KNOWN AS BILLY JOE LARA, APPELLANT

Submitted: June 12, 2002
Filed: June 24, 2002

Rehearing En Banc Granted;
Opinion and Judgment Vacated Aug. 1, 2002.

Before HANSEN, Chief Judge, FAGG and BOWMAN, Circuit Judges.

FAGG, Circuit Judge.

Bureau of Indian Affairs officers arrested Billy Jo Lara on the Spirit Lake Nation Reservation for public intoxication. Lara is an Indian, but not a member of the Spirit Lake Nation. When BIA officers reminded Lara of the order excluding him from the Spirit Lake Nation Reservation, Lara struck an officer with his fist. Lara pleaded guilty in tribal court to three violations of the Spirit Lake tribal code, including violence to a police officer. Later, Lara was charged in federal court with

misdemeanor assault of a federal officer. Lara moved to dismiss the indictment, claiming the federal charges violated the prohibition against Double Jeopardy and impermissible selective prosecution. The district court* denied Lara's motion to dismiss. Lara then entered a conditional guilty plea, reserving the right to appeal the denial of his pretrial motions. Having carefully reviewed de novo the district court's denial of Lara's motion to dismiss the indictment, we affirm. *United States v. Kriens*, 270 F.3d 597, 602 (8th Cir. 2001), *cert. denied*, 535 U.S. 1008, 122 S. Ct. 1586, 152 L. Ed. 2d 504 (2002).

Lara contends the federal prosecution duplicates the tribal conviction, holding him twice responsible for the same criminal conduct in violation of the Double Jeopardy Clause. Under the separate sovereign doctrine, a defendant may be prosecuted by multiple governmental units for the same conduct if the governmental units draw their authority from separate sources of power. *Heath v. Alabama*, 474 U.S. 82, 88, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985). Lara argues the separate sovereign doctrine does not apply because the Spirit Lake Nation and the federal government draw their power from the same source, the United States Constitution. The government responds the Spirit Lake Nation draws its authority from its retained sovereignty, not from a Congressional delegation of power. According to the Government, the Spirit Lake Nation is a separate sovereign and the successive federal prosecution is permissible. Resolution of Lara's contention, then, depends

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* The Honorable Alice R. Senechal, United States Magistrate Judge for the District of North Dakota, sitting by consent of the parties under 28 U.S.C. § 636(c).

on the Spirit Lake Nation's source of power to prosecute Lara.

The Supreme Court concluded that Indian nations draw their authority to prosecute criminal offenses by tribal members from the Indian nation's retained sovereignty and that tribal courts do not have jurisdiction over nonIndians. *United States v. Wheeler*, 435 U.S. 313, 325-26, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) (tribes have no jurisdiction over nonIndians). In 1990, the Supreme Court ruled that Indian nations lacked authority to prosecute nonmember Indians for criminal acts. *Duro v. Reina*, 495 U.S. 676, 685, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). *Duro* concluded by noting that any practical deficiencies in the present jurisdictional scheme should be addressed by Congress, "which has the ultimate authority over Indian affairs." *Id.* at 698, 110 S. Ct. 2053. Immediately after *Duro* issued, Congress amended the Indian Civil Rights Act (ICRA), redefining tribal powers of self-government to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (1994). Thus the amended ICRA clarifies that Indian nations have jurisdiction over criminal acts by Indians, whether the Indians are tribal members or nonmembers.

Because the courts are obligated to interpret the Constitution and declare what the law is, it is important to distinguish whether *Duro* was based on constitutional law or federal common law. *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). If *Duro* is a constitutional opinion, we must inquire whether Congress had the authority to overrule the Supreme

Court's decision. *Id.; City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). On the other hand, if *Duro* is based on federal common law, Congress properly clarified its intent by amending the ICRA, and we defer to Congress. *United States v. Enas*, 255 F.3d 662, 675 (9th Cir. 2001) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)), *cert. denied*, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002).

The Supreme Court has not addressed the relationship between *Duro* and the amended ICRA, or addressed the substantive issue of whether Congress is delegating authority under the amended ICRA or is recognizing retained tribal authority. We were presented with these very issues in *United States v. Weaselhead*, 156 F.3d 818, 821 (8th Cir. 1998), *reh'g granted and opinion vacated by*, 165 F.3d 1209 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 829, 120 S. Ct. 82, 145 L. Ed. 2d 70 (1999). In *Weaselhead*, an evenly divided en banc court affirmed the district court's denial of Weaselhead's motion to dismiss the indictment on Double Jeopardy grounds. The district court in *Weaselhead* concluded that Congress recognized retained tribal sovereignty when stating that tribes have criminal jurisdiction over nontribal members. *United States v. Weaselhead*, 36 F. Supp. 2d 908, 914-15 (D. Neb. 1997). Although we are not bound by the evenly divided court's decision, we reach the same result. *See United States v. Grey Bear*, 863 F.2d 572, 573 (8th Cir. 1988) (holding an equally divided en banc opinion decides the case, but has no precedential effect).

Like the district court, we conclude *Duro* grounds its holding in federal common law, not Constitutional law, because *Duro* discusses tribal sovereignty without

reference to the Constitution. *See United States v. Lara*, No. C2-01-58, 2001 WL 1789403, *3 (D.N.D. Nov. 29, 2001); *see also Enas*, 255 F.3d at 673-75; *Weaselhead*, 156 F.3d at 825 (dissent). Having concluded tribal sovereignty is governed by federal common law, we must defer to Congress. *Enas*, 255 F.3d at 673-75. The plain language of the amended ICRA together with the amendment's legislative history convinces us that Congress intended to recognize inherent tribal power, not to expressly delegate Congressional authority. *Weaselhead*, 36 F. Supp. 2d at 912-913 ("Indian tribal-governments have retained the criminal jurisdiction[ ] over non-member Indians and [the amendment] is not a delegation of this jurisdiction but a clarification") (quoting H.R. Conf. Rep. No. 102-261 at 3-4 (1991)). The Spirit Lake Nation, then, draws its power to prosecute Lara from its retained sovereignty. Because tribal authority and federal authority arise from the separate sources of the tribe's inherent power and the federal Constitution, the Double Jeopardy clause is not offended by two separate sovereigns convicting Lara for crimes arising from the same conduct. *See Enas*, 255 F.3d at 675; *United States v. Archambault*, 174 F. Supp. 2d 1009, 1022 (D.S.D. 2001); *Weaselhead*, 36 F. Supp. 2d at 915.

Next, Lara contends the federal Government's decision to prosecute him for misdemeanor assault resulted from impermissible selective prosecution based on race. We disagree. At issue is the United States Attorneys' policy of not prosecuting federal misdemeanors for acts that resulted in earlier state or federal convictions, known as the *Petite* policy. *United States Attorneys' Manual* § 9-2.031 (describing the *Petite* policy regulating successive misdemeanor prosecu-

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because the *Petite* policy does not confer sub
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rights. *United States v. Basile*, 109 F.3d 1304,
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v. Armstrong, 517 U.S. 456, 465, 116 S. Ct. 148
Ed. 2d 687 (1996).

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We thus affirm the district court's denial
motion to dismiss the indictment.

HANSEN, Circuit Judge, dissenting.

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I respectfully dissent. In my opinion, Lara
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818 (8th Cir. 1998), authored by Judge Woll
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As drafted, the revisions to the ICRA p
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organizing principles by which Indian tribes were incorporated into our constitutional system of government as recognized in *Duro*, *Wheeler*, and *Oliphant*. Because those principles are not only based on federal common law but are also most firmly grounded in constitutional principles, I would hold that while Congress may certainly delegate new powers to tribes, it may do so only under constitutional constraints. It may not rewrite the history of retained sovereignty under the label of federal common law.

By virtue of their status as the aboriginal people of this continent, Indian tribes retain certain incidents of their preexisting inherent sovereignty. Among these is the right to internal self-government, which "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Wheeler*, 435 U.S. at 322, 98 S. Ct. 1079. If the power to punish nonmember Indians emanated from a tribe's inherent sovereignty, double jeopardy would not be implicated by a subsequent federal prosecution for the same conduct. If, however, the ultimate source of power authorizing a tribal criminal conviction is "an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress," the Double Jeopardy Clause would bar a subsequent federal prosecution. *Id.*

"The sovereignty that the Indian tribes retain is of a unique and limited character" which "exists only at the sufferance of Congress and is subject to complete defeasance." *Wheeler*, 435 U.S. at 323, 98 S. Ct. 1079. The Court stated in *Wheeler*, that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their

dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326, 98 S. Ct. 1079. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.*

The Supreme Court's holding in *Duro*, which states that Indian tribes do not have inherent sovereignty to assert criminal jurisdiction over nonmember Indians, is grounded in constitutional law. In *Duro*, the Court confirmed its earlier statements characterizing the dependent status of tribes and their power of internal self governance, as well as our prior conclusion that, at least in criminal matters, a tribe's inherent sovereign powers extend only to tribe members, irrespective of an individual's racial status as an Indian. 495 U.S. at 686, 110 S. Ct. 2053; *see also, Greywater v. Joshua*, 846 F.2d 486, 493 (8th Cir. 1988) ("We thus conclude that the Tribe's authority to prosecute nonmember Indians is nonexistent."). The Court in *Duro* recognized that when a criminal prosecution reflects a "manifestation of external relations between the Tribe and outsiders," including nonmember Indians, this type of power is necessarily "inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress." 495 U.S. at 686, 110 S. Ct. 2053. Importantly, the Court stated that any such congressional delegation of power is "subject to the constraints of the Constitution." *Id.* The Court explained that "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves

a far more direct intrusion on personal liberties." *Id.* at 688, 110 S. Ct. 2053. Because all Indians are also full citizens of the United States, such an intrusion necessarily implicates "constitutional limitations," and we must reject "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 693-94, 110 S. Ct. 2053.

The *Duro* Court further stated:

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

495 U.S. at 693, 110 S.Ct. 2053 (internal quotations omitted). Thus, "the sovereignty retained by the tribes in their dependent status within our scheme of government" does not include the power of criminal

jurisdiction over nonmembers, even if they are Indians. *Id.* at 684, 110 S. Ct. 2053.

While the Supreme Court has not yet had occasion to directly construe the post-*Duro* revision of the ICRA, the Court has since affirmed the principle that jurisdiction of an Indian tribe over nonmembers of the tribe, irrespective of race, is not within "[g]eneral principles of 'inherent sovereignty'" and is not possible, absent an affirmative delegation of power from Congress. *See South Dakota v. Bourland*, 508 U.S. 679, 694-95, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993). Additionally, a subsequent concurring opinion recognized that since *Duro*, "Congress passed a statute expressly granting tribal courts . . . jurisdiction" over nonmember Indians, and distinguishing *Duro* factually by explaining that "here, we are concerned with the extent of tribes' inherent authority, and not with the jurisdiction statutorily conferred on them by Congress" as in the post-*Duro* amendment context. *Nevada v. Hicks*, 533 U.S. 353, 377 n.2, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (Souter, J., concurring).

Prior to the revisions, tribal criminal jurisdiction over nonmember Indians did not exist as it had been "necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Duro*, 495 U.S. at 693, 110 S. Ct. 2053. It is beyond Congress's power to declare that the inherent sovereignty of a tribe has always provided it with criminal authority over nonmember Indians where the Supreme Court has found the facts to be otherwise. It is my opinion that the "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and is thus beyond

the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to '[s]hifting legislative majorities' free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another." *Weaselhead*, 156 F.3d at 824 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 529, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)) (alteration in original) (opinion vacated). This conclusion is firmly grounded in constitutional principles which guarantee equal protection to all citizens regardless of race** and also protect personal liberties; it is inextricably linked to the very basis on which our constitutional system was established—that the authority to govern is derived from the consent of the governed. Thus, in spite of Congress's attempt to characterize this grant of authority as a mere recognition of a power that has always existed, the post-*Duro* amendment can be nothing more nor less than an affirmative delegation of jurisdiction from Congress to the tribes, the validity of which is not at issue in this case.

Because the power of the tribe to punish nonmember Indians emanates solely from a congressional delegation of authority, the tribal court and the federal court in which a second conviction is now sought to be secured do not "draw their authority to punish the offender from distinct sources of power" but from the identical source. *Heath*, 474 U.S. at 88, 106 S. Ct. 433.

** The Equal Protection Clause of the Fourteenth Amendment is made applicable to the federal government through the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L.Ed. 884 (1954); *United States v. Iron Shell*, 633 F.2d 77, 89 n.17 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981).

That single source is the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States as the overriding sovereign under the Constitution. The dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable, and the Double Jeopardy Clause bars the federal prosecution of Lara for the same conduct that provided the factual basis for his earlier conviction in tribal court.

For these reasons, I would reverse the district court's denial of Lara's motion to dismiss the indictment. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

No. C2-01-58

UNITED STATES OF AMERICA

v.

BILLY JO LARA A/K/A BILLY JOE LARA

Nov. 29, 2001

MEMORANDUM OPINION

SENECHAL, Magistrate J.

This case presents the issue of whether the double jeopardy clause bars federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct. It is an issue on which there is no binding precedent.

FACTS

Defendant Billy Jo Lara, a/k/a Billy Joe Lara, was charged in an Indictment with a misdemeanor assault of a federal officer under 18 U.S.C. § 111(a)(1). Defendant Lara consented to proceed before a magistrate judge pursuant to 18 U.S.C. § 3401(b).

Defendant Lara filed two motions to dismiss the indictment. One motion asked that the indictment be

dismissed as violative of the double jeopardy clause. The other motion asked that the indictment be dismissed for selective prosecution, or that in the alternative discovery be allowed. Both motions were denied in an Order dated November 1, 2001, which also stated that this memorandum opinion would follow.

After the motions were denied, and with the consent of the government and approval of this Court, Defendant Lara entered a conditional plea of guilty pursuant to Fed. R. Crim. Pro. 11(a)(2). An Order for Release Pending Sentencing, which incorporated an Amended Order Setting Conditions of Release, was filed following the conditional guilty plea.

The charge to which Mr. Lara entered a conditional guilty plea is simple assault against a federal officer. The incident occurred while Mr. Lara was in the custody of Bureau of Indian Affairs officers on the Spirit Lake Nation Reservation. The incident occurred after Mr. Lara was arrested for public intoxication on June 13, 2001, and was transported to the police department. BIA officers told Mr. Lara of an order excluding him, a nonmember of the Spirit Lake Nation, from the Spirit Lake Nation Reservation. After he was told of the exclusion order, Mr. Lara hit BIA Police Officer Byron Swan.

Mr. Lara was charged with violations of the Spirit Lake Tribal Code: violence to a policeman [sic], resisting lawful arrest, trespassing, disobedience to a lawful order of the tribal court, and public intoxication. Two days later, on June 15, 2001, Mr. Lara pled guilty to three of the tribal charges: violence to a police officer, resisting lawful arrest, and public intoxication. On the three charges, he was sentenced to a term of 155 days in jail.

On August 29, 2001, a federal grand jury returned an indictment charging Mr. Lara with assault on a federal officer. He alleges that the indictment violates the double jeopardy clause, because the charge is based on the same conduct as that for which the tribal sentences were imposed.

Double Jeopardy

The double jeopardy clause provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause must be applied in light of the dual sovereignty doctrine, which provides that successive prosecutions initiated by separate sovereigns do not violate the double jeopardy clause. *See, e.g., United States v. Wheeler*, 435 U.S. 313 (1978); *Koon v. United States*, 518 U.S. 81 (1996).

The dual sovereignty doctrine is based on the principle that a crime is an offense against the sovereignty of a government, and that when a single act violates the sovereignty of two governments, the offender has committed two distinct offenses. *E.g., Heath v. Alabama*, 474 U.S. 82 (1985). If an action violates the laws of two sovereigns, the dual sovereignty doctrine holds that prosecution by both sovereigns does not result in the offender being punished twice for the same offense, but rather that the single action constitutes two offenses, and the offender can be punished for both offenses. *Id.* The dual sovereignty doctrine does not apply if the prosecuting entities are only nominally different; the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources. *Id.*, 474 U.S. at 90. It must be determined, therefore, whether the Spirit Lake Nation's authority to prosecute Mr. Lara is

derived from the same source as is the federal government's authority to prosecute him.

The premise of defendant's position is that, since he is a nonmember of the Spirit Lake Nation, the tribe had no inherent authority to prosecute him, and that the tribe's only authority to prosecute him arose from a federal statute. If that were true, the tribal prosecution would have arisen from the same source of authority as the federal prosecution, the dual sovereignty doctrine would not apply, and the double jeopardy clause would bar the federal government's prosecution of Mr. Lara. The Court must therefore consider whether the tribe's authority to prosecute Mr. Lara arises from an inherent power or a power delegated by federal statute.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court determined that Indian tribes did not have criminal jurisdiction over nonmember Indians. Shortly after the *Duro* decision, Congress amended the Indian Civil Rights Act's definition of tribal "powers of self-government." Before the 1990 amendment, the term was defined to include:

> all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses.

The 1990 amendments changed the definition to include:

> all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; *and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians* (emphasis added).

25 U.S.C. § 1301(2) (2000). Those courts which have found the double jeopardy clause bars a federal prosecution in these circumstances have concluded that the ICRA amendments constitute a delegation of power rather than "simply a non-substantive 'recognition' of inherent rights that Indian tribes have always held ." *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), *rehearing granted and opinion vacated*, 165 F.3d 1209 (8th Cir.) (*en banc*), *cert. denied*, 528 U.S. 829 (1999).

Mr. Weaselhead, a member of the Blackfoot Tribe, was prosecuted for sexually assaulting a minor on the Winnebago Indian Reservation. Mr. Weaselhead was later indicted by a federal grand jury for the same conduct. The district court denied a motion to dismiss the federal charges, holding that the Winnebago Tribe exercised its inherent sovereignty in prosecuting Mr. Weaselhead, a nonmember Indian, and that the tribe and federal government are two separate sovereigns for purposes of analysis under the double jeopardy clause. *United States v. Weaselhead*, 36 F.Supp. 908 (D. Neb. 1997). A divided panel of the Eighth Circuit reversed the district court's denial of the motion to dismiss. A petition for rehearing was granted, and the Court sitting *en banc* was equally divided, resulting in vacation of the panel opinion and affirmance of the district court opinion. The *en banc* decision has no precedential effect.

The United States District Court for the District of South Dakota recently addressed the same issue presented in *Weaselhead*, and in this case. That Court reached the same conclusion as had the *Weaselhead* trial court, and denied the motion to dismiss on double jeopardy grounds. *United States v. Archambault*, 2001 WL 1297767 (D.S.D. Oct. 18, 2001).

Two district courts in the Eighth Circuit, the *Weaselhead* trial court and the *Archambault* trial court, have determined that Congress had the authority to recognize inherent rights of Indian tribes, because the *Duro* decision is based on federal common law rather than on the Constitution. The Ninth Circuit, *en banc*, reached the same conclusion in *United States v. Enas*, 255 F.2d 662 (9th Cir. 2001).

This Court adopts the reasoning of the *Weaselhead* and *Archambault* trial courts, and of the Ninth Circuit's *Enas* decision. Concluding that the ICRA amendment was a valid recognition of inherent rights of Indian tribes, this Court concludes that authority for the tribal prosecution and the federal prosecution of Mr. Lara are derived from independent sources. The dual sovereignty doctrine therefore applies, and the federal prosecution does not violate the double jeopardy clause.

Selective Prosecution under Petite Policy

Mr. Lara asserts that the government's *Petite* policy results in impermissible selective prosecution based on the race of the defendant. He moved to dismiss the indictment on those grounds, or in the alternative for discovery. The *Petite* policy, based on *Petite v. United States*, 361 U.S. 529 (1960):

> precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied; first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

United States Attorneys' Manual § 9-2.031(A). Approval from the appropriate assistant attorney general is also required. *Id.*

Mr. Lara asserts that, since the *Petite* policy does not apply to prior tribal court prosecutions, and since only Indians can be prosecuted in tribal courts, the *Petite* policy never applies to preclude a second prosecution against an Indian, and therefore discriminates based on race. Mr. Lara cited no case law in support of his position.

The government's response is that the *Petite* policy does not confer substantive rights, but that, if the *Petite* policy were applied, Mr. Lara's prosecution would proceed. At argument, the government referenced other recent prosecutions in this district of non-Indian persons charged with assault against a federal officer.

To succeed on a claim of selective prosecution, one must meet a demanding standard. One claiming selective prosecution must show that the prosecutory policy

had a discriminatory effect and that it w as motivated by a discriminatory purpose. *United St ates v. Armstrong*, 517 U.S. 456, 465 (1996). "To est ablish a discriminatory effect in a race case, the cl aimant must show that similarly situated individuals o of a different race were not prosecuted." *Id.* The standard for allowing discovery to establish a selective e prosecution is also rigorous. A defendant must make a threshold credible showing that persons of other rac es could have been, but were not, prosecuted for the offense with which the defendant is charged. *Id.*, 517 U.S. at 470.

Mr. Lara made no threshold showing th at persons of other races could have been, but were not, charged with assault on a federal officer subsequent to a prosecution by another jurisdiction for the same conduct. He did not satisfy the requirements of *Armstrong* to allow discovery of information to assist in establishing his claim of selective prosecution.

It is well established that the *Petite* policy does not confer substantive rights on a criminal defendant. A challenge to application of the policy cannot establish a claim that a subsequent prosecution constituted selective prosecution barred by the equal protection clause. *United States v. Simpkins*, 953 F.2d 443 (8th Cir.), *cert. denied*, 504 U.S. 928 (1992).

CONCLUSION

An Indian tribe's authority to prosecute a nonmember Indian is derived from the tribe's inherent powers. The federal government's authority for prosecution for the same conduct is derived from federal statute. Since the prosecutorial authority of the tribe and of the federal government are derived from independent sources, the dual sovereignty doctrine

applies. Federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct is not barred by the double jeopardy clause.

Under the rigorous standards of *United States v. Armstrong*, Mr. Lara failed to establish that his prosecution by the federal government was an impermissible selective prosecution in violation of the equal protection clause, or that he was entitled to discovery to pursue that claim.

APPENDIX D

1. Section 1301 of Title 25 of the United States Code provides:

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self- government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

2. Section 1302 of Title 25 of the United States Code provides:

No Indian tribe in exercising powers of self-government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and* a fine of $5,000, or both;

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* So in original. Probably should be "or".

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. Section 1303 of Title 25 of the United States Code provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.